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IN THE SUPREME COURT OF THE STATE OF ALASKA

HONORABLE MICHAEL J.)
DUNLEAVY, in his official capacity)
as Governor for the State of Alaska,)
)
Appellant,) Supreme Court No.:
)
v.)
)
THE ALASKA LEGISLATIVE)
COUNCIL, on behalf of THE)
ALASKA STATE LEGISLATURE,)
)
Appellee.)

Trial Court Case No.: 1JU-20-00938 CI

**WRITTEN STATEMENT OF FACTS IN SUPPORT OF EMERGENCY
MOTION FOR EXPEDITED ACTION**

Appellant Governor Dunleavy provides the following statement of facts in support of this emergency motion:

1. The second regular session of the Thirty-First Alaska Legislature convened in Juneau on January 21, 2020. During the session Governor Dunleavy presented the Legislature with the names of nearly 100 individuals that he had appointed to executive branch positions, including the Commissioner of Revenue, the Public Defender, and various positions on the state's many boards and commissions, under his authority of Article III §§25-26 of the Alaska Constitution.

2. In the winter of 2020 Alaska and the world was hit by the COVID-19 pandemic, leading Governor Dunleavy to issue a disaster emergency under AS 26.23.020(c) on March 11, 2020.

3. On March 29, 2020, the Alaska Legislature went on an extended recess, without ever meeting in joint session for purposes of confirmation.

4. Before going into recess, the Legislature also passed SB 241, extending the Governor's public health disaster emergency declaration to November 15, 2020. See Ch. 10, SLA 2020. And rather than vote on the governor's appointees, the Legislature also passed HB 309, which addressed procedures for confirmation of the Governor's recent appointments. HB 309 made a number of modifications to AS 39.05.080, regarding procedure on gubernatorial appointments. Specifically, it extended the time in which the legislature could act on appointments, and provided that failure to act before the end of the 2020 regular session was not tantamount to declination of confirmation on the last day of the regular session. HB 309 stated instead that failure of the Legislature to act would be tantamount to declination of confirmation at a later date, the earlier of (1) January 18, 2021; (2) 30 days after expiration of the governor's declaration of a public health emergency or issuance; or (3) issuance of a proclamation that the emergency no longer exists.

5. Because SB 241 extended the public health disaster emergency until November 15, 2020, under HB 309 the governor's appointees were deemed not to have been confirmed on December 15, 2020.

6. The following day, Governor Dunleavy notified the Senate President and the Speaker of the House that appointees who had not received a confirmation vote continued to serve under valid appointments, and that he was exercising his recess appointment authority under Article III section 27 of the Alaska Constitution to

continue their appointments. The governor explained that he would also present the names of individuals who had been previously appointed but not confirmed in joint session along with any new appointments, to the Thirty-Second Alaska Legislature by February 3, 2021.

7. On December 23, 2020, the Alaska Legislative Council, on behalf of the Alaska Legislature, filed the complaint in case no. 1JU-20-00938CI in superior court. The Council requested a declaratory judgment that the gubernatorial appointees should have been deemed rejected for confirmation by legislative inaction and requested injunctive relief prohibiting the governor from continuing their appointments or exercising his recess appointment authority under Article III §27 of the Alaska Constitution. In the Council's view, despite the text of Article III § 25 and 26, which both state that the governor shall appoint officials "subject to confirmation by a majority of the members of the legislature in joint session," the legislature did not need to meet in joint session to vote to confirm or decline the appointments at all.

8. One week later the Council filed a motion for a preliminary injunction along with a request for expedited consideration of the matter. The superior court granted the Council's motion for expedited consideration, set a briefing schedule on the preliminary injunction, and scheduled oral argument for January 8, 2021.

9. Meanwhile, Governor Dunleavy filed an answer and counterclaim. He claimed that by failing to meet in joint session to vote on the appointees presented during the second regular session, the legislature violated article III sections 25 and 26 of the Alaska Constitution, AS 39.05.080(2) and Chapter 9, SLA 2020 §1(a). He also requested

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a declaratory judgment that AS 39.05.080(3) and section 1(b), chapter 9, SLA 2020 are unconstitutional. The Governor also opposed the Council's request for a preliminary injunction.

10. On January 8, 2021, the superior court denied the Council's motion for a preliminary injunction, concluding the Council had not shown a "clear probability" of prevailing on the merits. The superior court also recognized that granting the Council's injunction "would immediately remove seven of the eight members of the State Medical Board from their positions in the midst of the COVID – 19 pandemic."

11. On January 19, 2021, the Thirty-Second Alaska Legislature convened.

12. Since that date, and as described in the affidavit of Gina Ritacco, Director of Boards and Commissions, Governor Dunleavy has presented 181 names for confirmation in joint session.

13. Following comprehensive merits briefing on cross motions for summary judgment and oral argument, the superior court granted the Council's motion for summary judgment on February 18, 2021.

14. The Thirty-Second Legislature is currently over one-third of the way through its statutorily proscribed ninety-day session. Under AS 24.05.090, the Legislature is scheduled to adjourn on April 18, 2021.

15. As of today, the Legislature has not yet met in joint session to vote to confirm or reject any of the 181 gubernatorial appointees.

16. The current list of gubernatorial appointees awaiting legislative confirmation include the Commissioner of Revenue, the Public Defender, the Attorney

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General, and multiple members of various boards and commissions. Some of the individuals awaiting legislative confirmation have been appointed to boards that play a critical role in public health, including the State Medical Board, the Board of Pharmacy, and the Board of Nursing, just to name a few. Many boards require the participation of these newly appointed but not yet confirmed members in order to have a quorum to conduct state business.

17. If the Thirty-second Legislature adjourns like it did last year without meeting in joint session and voting to confirm or reject the entire slate of gubernatorial appointees—now at 181 positions—the state will be faced with a massive vacancy gap across agencies, boards, and commissions. Many of these vacancies are difficult to fill and are critical to assuring the health, safety, and well-being of Alaskans—particularly during a global pandemic.

18. As explained in the attached affidavit of Gina Ritacco, the Office of Boards and Commissions typically takes from two weeks to three months to fill an open vacancy. Because the superior court’s decision permits the Legislature to disapprove all of the appointments without taking action before it adjourns the legislative session, the governor’s office will need as much time as possible to prepare for an orderly transition of state government operations if the superior court’s decision is affirmed. And if it is reversed, the Legislature will need to know whether appointees may continue to serve until the legislature meets in joint session to vote to confirm or reject the 181 appointees who have already been presented.

19. For the foregoing reasons, Governor Dunleavy believes this matter warrants expedited briefing and a decision by Monday, April 12, 2021—a little less than one week prior to the ninety-day statutory timeframe for the regular session.

DATED February 23, 2021.

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